Editor's note: Appealed -- reversed, Civ.No. 87-618-ECR (D. Nev. Dec. 7, 1988), 702 F.Supp. 820

B. G. BUNYARD
v.
BUREAU OF LAND MANAGEMENT

IBLA 85-124 Decided March 12, 1987

Appeal from decision of Administrative Law Judge E. Kendall Clarke, dismissing appeal from decision of District Manager, Susanville District, California, Bureau of Land Management, providing in part for future reductions in grazing preferences on proportionate basis. CA-02-83-2.

Affirmed.

1. Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Cancellation or Reduction -- Regulations: Interpretation

Where there has been a decrease in Federal lands available for grazing, BLM may impose a proportionate reduction among all the authorized users of a particular allotment as proportionate reduction is consistent with the equitable reduction required under 43 CFR 4110.4-2(a).

APPEARANCES: John P. Baker, Esq., Alturas, California, for appellant; James A. Callahan, Esq., Winnemucca, Nevada, for intervenors Ken H. and Doris Earp; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

B. G. Bunyard has appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated November 1, 1984, dismissing his appeal of an April 14, 1983, decision of the District Manager, Susanville District, California, Bureau of Land Management (BLM), providing in part for future reductions in appellant's and others' grazing preferences in the Massacre Mountain allotment on a proportionate basis.

On March 18, 1983, the District Manager issued a proposed decision establishing in part the allocation of grazing privileges in the Massacre Mountain allotment between appellant and Ken H. and Doris Earp, thereby

"accept[ing] the TRT [Technical Review Team] Report as amended by the Steering Committee." Under that proposed decision, appellant was to be allocated 2,818 animal unit months (AUM's) (25 percent) and the Earps 8,338 AUM's (75 percent) in the Massacre Mountain allotment. The District Manager stated: "Future adjustments (increase or decrease) in grazing preference * * * will be made proportionately based on the percentages described in the above table." The record indicates that BLM contemplated a 22 percent reduction in grazing preferences to take place in 1984 or to be phased in over a 5-year period due to the exclusion of certain land from livestock grazing in the Massacre Mountain allotment. See Exh. 6.

On April 1, 1983, appellant filed a protest to the proposed BLM decision pursuant to 43 CFR 4160.2, challenging the proposed future reduction in grazing preferences "on a proportionate basis." Appellant argued that the Earps should bear the full burden of any future reduction. In his April 1983 decision, the District Manager responded to appellant's protest, concluding:

> Throughout your grounds for protest you allege that for various reasons [the] Earps should bear all of any proposed reductions. Pursuant to our regulations, any adjustments shall be on a proportionate basis unless agreed upon otherwise (43 CFR 4110.3-1(c)(2); 4110.4-2(a)). As you are well aware, we have tried numerous times to affect an agreement to no avail. Therefore, any adjustments in grazing preference will be as stated in the Proposed Decision.

The District Manager, accordingly, adopted the allocation of grazing privileges and the decision to make future adjustments proportionately based on that allocation, set forth in the proposed decision. 1/ On May 11, 1983, appellant appealed from the District Manager's April 1983 decision pursuant to 43 CFR 4160.4.

On November 9, 1983, a hearing was held before Judge Clarke in Alturas, California, at which all parties were represented, including the Earps who had intervened in the proceedings. In his November 1984 decision, Judge Clarke dismissed appellant's appeal of the District Manager's April 1983 decision, concluding that while the applicable regulation, 43 CFR 4110.4-2(a), permitted the authorized officer to deviate from a "proportionate share reduction" in grazing preferences in order to effect an "equitable" apportionment, appellant had failed to justify such a deviation. Judge Clarke also stated that "where there is a reduction in a grazing area used by users in common * * * a proportionate share reduction is, in fact, equitable."

1/ The District Manager also cited 43 CFR 4110.3-1(c)(2) which provides that additional forage over and above the preferences of permittees or lessees in an allotment may be allocated to those permittees or lessees "in proportion to their contribution or efforts which resulted in increased forage production." This regulation does not apply to decreases in grazing capacity within an allotment caused by decreases in available forage (see 43 CFR 4110.3-2) or decreases in available land (see 43 CFR 4110.4-2).

The factual background of this case is not in dispute and is set forth in Judge Clarke's decision at pages 1-3:

> In 1964 the boundaries of the Massacre [Allotment] of the Susanville District were established by a decision of the district manager (Ex. 3). In 1965 there were two permittees in the Massacre [Allotment], these being Bunyard and Bedford U Ranch, a predecessor in interest to Earp, the intervenor herein. Following a 1965 adjudication, Bunyard's active AUMs were set at 2,254 and Bedford U's at 6,398 or 26.1 and 73.9 percent of the total AUMs of the unit, respectively (Ex. 4).
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> Prior to 1975 the predecessors in interest to Earp owned much of the land in the bottom of High Rock Canyon which is part of the Massacre [Allotment]. Most of the [g]razing in the Canyon area of the allotment is in the bottom of the canyon where the deeded lands were located (Exs. 1 and 2; Tr. 33-34). In 1975, White Pine, a predecessor in interest to Earp, traded the deeded lands in the bottom of the canyon to the BLM for lands located in another unit where they also had grazing privileges (Ex. 2; Tr. 33).
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> As a result of the exchange of ownership nothing much changed by way of grazing privileges except that the BLM picked up a minor number of additional AUMs in the Massacre [Allotment] which were then assigned to White Pine (Tr. 58-59). This procedure was the normal way in which BLM handled such matters where the AUM[s] had been available before the exchange to the entity to which they were assigned after the exchange.
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> Prior to the exchange, the division of AUMs in the Massacre [Allotment] between Bunyard and White Pine was 26.1 and 73.9 percent and after the exchange it was 25.3 and 74.7 percent.
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> In 1977 an ad hoc public advisory group was formed by the BLM for the purpose of studying and making recommendations concerning the use of resources in, among other areas, the Massacre allotment (Tr. 12). The committee recommended that grazing be excluded from High Rock Canyon (Tr. 14). In 1980 the Steering Committee of Modoc-Washoe Experimental Stewardship Program made a similar recommendation because of the values to be protected in the canyon. This recommendation also encompassed the area east of the canyon (Tr. 19-20).
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> In 1981 the proposed exclusion was incorporated into the Cow Head-Massacre Management Framework Plan [MFP] which proposed that the reduction in AUMs in the Massacre allotment, necessitated by the exclusion of grazing from the canyon and the area east of the canyon, be absorbed by Earp (Tr. 21-22). Because of opposition to the proposal from various quarters, the district advisory council recommended that the Modoc-Washoe Experimental Stewardship Program try to resolve the conflicts (Tr. 22). The issue was

> referred to the Steering Committee of the Stewardship Program and at the recommendation of the Steering Committee a Technical Review Team was formed to study the issue and make recommendations concerning the same (Tr. 22). Bunyard was opposed to taking any reductions in his permit, and consequently the stocking rate issue was not resolved by the Technical Review Team but rather passed back to the Steering Committee (Tr. 23). The Steering Committee in turn referred the issue to the Executive Committee and the Executive Committee returned it to the Technical Review Team to resolve (Tr. 24). After further study by the Technical Review Team all of the members of the team, including Bunyard, agreed to both the reduction of 22 percent and the reduction be proportionate (Ex. 6). That recommendation was referred back to the Steering Committee at which point Bunyard expressed his disagreement with the proposal. The Steering Committee nevertheless passed on the TRT recommendation to the district manager and he in turn utilized that recommendation in the decision from which this appeal is taken (Tr. 26).

Appellant's principal contention on appeal is that the TRT recommendation and the District Manager's April 1983 decision, providing for a proportionate reduction in grazing preferences, were predicated on the erroneous conclusion that such a reduction was required by law in the absence of an agreement between the appropriate parties. Appellant argues that while Judge Clarke concluded that a proportionate reduction in this case is equitable, the case should be remanded to BLM to reconsider the question of reducing grazing preferences because, but for the erroneous conclusion, the District Manager's April 1983 decision "may well have been different." Appellant states that this accords with "[f]undamental due process."

In response to appellant's statement of reasons, counsel for BLM argues that, regardless of any misconstruction of the law by the TRT and Steering Committee, in the absence of a consensus on the part of those bodies, the decision on reducing grazing preferences was properly made by the District Manager. Intervenors argue in response to appellant's statement of reasons that Judge Clarke's November 1984 decision should be affirmed because appellant failed to carry his burden of proving that the proportionate reduction in grazing preferences is not equitable and, thus, not in accord with 43 CFR 4110.4-2(a). Intervenors also argue that appellant was afforded ample due process, although he had no compensable property right under the doctrine set forth in United States v. Fuller, 409 U.S. 488 (1972).

[1] The applicable regulation, 43 CFR 4110.4-2(a), provides that grazing preferences shall be cancelled in whole or in part "[w]here there is a decrease in public land acreage available for livestock grazing use within an allotment" and that "cancellations will be equitably apportioned by the authorized officer or as agreed to among authorized users and the authorized officer." (Emphasis added.) Prior to August 4, 1978, the applicable regulation, 43 CFR 4111.4-3(a)(3) (1977), provided for the downward adjustment of grazing privileges, in order to reflect decreases in grazing capacity within an allotment, to be imposed on properly issued regular licenses or permits

"on an equal percentage basis." Thus, there has been a regulatory shift from mandating a proportionate reduction to providing for an equitable apportionment amongst authorized users within an allotment where there has been a decrease in Federal land available for grazing. The parties herein recognize that a proportionate reduction in grazing preferences may, under certain circumstances, constitute an equitable apportionment in accordance with 43 CFR 4110.4-2(a).

In his November 1984 decision, Judge Clarke, as did the District Manager in his April 1983 decision, dealt with a number of the reasons offered by appellant for allocating the full burden of any future reductions in grazing preferences to the Earps and essentially affirmed the District Manager's decision because appellant had failed to establish that a proportionate reduction is not an equitable apportionment under 43 CFR 4110.4-2(a). Judge Clarke concluded that a proportionate reduction is necessarily an equitable apportionment under the particular facts of this case because it involves "users in common." Similarly, the District Manager had determined that a proportionate reduction would be an equitable apportionment mandated by 43 CFR 4110.4-2(a) in the absence of an agreement between the authorized users. Clearly the regulation does not mandate proportionate reduction in every case. BLM is delegated the responsibility to determine on a case by case basis what is an equitable apportionment. In this case it was not improper for BLM to equate "equitably apportioned" with "proportionate" in implementing the regulation.

The reasons offered by appellant for allocating any future reductions in grazing preferences in other than a proportionate manner were not found persuasive by Judge Clark. In his decision he concluded:

> The regulation does not require proportionate share but states that cancellations will be equitably apportioned. It appears clear that where there is a reduction in a grazing area used by users in common that a proportionate share reduction is, in fact, equitable. The regulation using the term "equitable" permits the managing officer to make adjustments in cases where there is a relevant basis for deviating from a proportionate share reduction. None of the arguments raised by the appellant herein appear to have any relevancy whatsoever in justifying the Bureau of Land Management personnel from deviating from a proportionate share reduction in order to carry out the regulatory requirements of equitable apportioned cancellation of privileges.

Decision at 4. The District Manager made the following statement at the hearing:

> [I]n my career with the Bureau I have gone through a lot of adjudications similar [to] that [which] occurred in the early 1960's and I was raised to understand that there was no other way to do business other than by proportionate share. If you deviate from that, you raise all kinds of specters that simply couldn't

> be defended and the only way to be, to follow the body of law and the body of judicial decisions that have been rendered was in fact to proceed on the basis of proportionate share and I proceeded that way here.

(Tr. 62). It is clear that the District Manager considered the most equitable method to allocate the reduction was to do so on a proportionate basis. Immediately following the quoted statement, this colloquy took place between the District Manager and appellant's attorney: "Q Mr. Cleary, if I understand your testimony correctly then, it is your position that you really have no choice under your interpretation of the regulations but to distribute the reduction on a proportionate basis? A That's correct." Id. See also Tr. 40, 53-54. Appellant argues that because BLM and the various groups involved in the decisionmaking process were laboring under the illusion that the law required proportionate reduction in the absence of an agreement, the case should be remanded to allow reconsideration in light of the proper standard. Counsel for BLM points out that in order to reach agreement, the groups require a consensus, and since appellant and the intervenors are members of the group, consensus would not be obtained. Under those circumstances, the BLM District Manager would again be required to allocate the reduction.

We find that the District Manager's determination in this case is equitable. The appellant and the Earps share the allotment on a defined percentage basis. We conclude that it was proper to determine, in the absence of an agreement, that the reduction should be shared on that same basis. BLM properly held that the reduction in grazing preferences herein should be on a proportionate basis.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Bruce R. Harris
Administrative Judge.